Supreme Court, U.S.
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No. 01-1603

IN THE

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

v.

SWIFT TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Swift Transportation Co. Inc., is an Arizona corporation owned by Respondent Swift Transportation Corporation, a Nevada corporation which, in turn, is wholly owned by Swift Transportation Co., Inc., a Nevada corporation which is publicly traded on NASDAQ. As of December 31, 2001, the only publicly-traded entity holding more than 10% interest in Swift Transportation Co., Inc. (Nevada), is FMR Corporation. FMR is affiliated with Fidelity Mutual Funds.

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioners state the question to be considered in this matter as whether a state's tolling statute may be used to prevent the application of the federal tolling statute to their case. Pet., p. 2. The true question is whether the statute upon which Petitioners rely, 28 U.S.C. § 1367, is even applicable to their factual situation.

B. PROCEEDINGS BELOW

This is the second time this case has been before the Federal Appellate Courts.[1] The first time involved the dismissal by the United States District Court for the District of New Mexico of Petitioners' second lawsuit against the same parties (and the United States), arising out of the same facts. Petitioners' first case had been dismissed by the United States District Court for want of jurisdiction.[2]

All three of Petitioners' lawsuits seek various damages from Respondents (and in *Levy II* also from the United States), arising out of a motor vehicle accident that occurred in New Mexico on July 20, 1994. *Levy I* was dismissed for

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1. The first time was on Petitioners' Petition for Writ of Certiorari in *Levy v. Swift Transportation Co., et al.*, 99-1356. That Petition was denied on April 3, 2000.

2. *See, Levy v. Swift Transportation Co., et al.*, Civ. 97-0777 (DNM 1997) (*Levy I*); *Levy v. Swift Transportation Co., et al.*, Civ. 98-578 (DNM 1998), *aff'd*, 194 F.3d 1320 (10th Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000) (*Levy II*). The instant case is referred to by the courts and parties as *Levy III*.

want of diversity jurisdiction because the Levys and Respondent Tiggs are all residents of Texas. *Levy II* was dismissed because Petitioners failed to comply with the statute of limitations in the Federal Tort Claims Act[3] and because there was still no diversity between Petitioners and Respondent Tiggs.

It is important to note that in dismissing *Levy II*, the district court found that Petitioners had filed essentially the same claims against the non-governmental defendants which had been dismissed in *Levy I*. The *Levy I* court had also predicted that the claims against the United States would be found fatally defective. Petitioners completely ignored these warnings when they filed *Levy II*. This behavior led the *Levy II* court to prohibit Petitioners from filing further suits against these Respondents in the Federal District of New Mexico. Memorandum Opinion and Order Barring Plaintiff [sic] From Further Filing, *Levy II*, May 14, 1999.

This procedural history is important because it forms the basis for the New Mexico Courts' decisions that, under New Mexico law[4], Petitioners had been negligent in prosecuting their case, thereby removing themselves from the protection of the state tolling statute.

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3. 28 U.S.C. § 2401(b) (FTCA hereafter).

4. NMSA 1978, § 37-1-14, the New Mexico tolling statute, reads as follows:

> If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

Finally, Respondents note that Petitioners admit they unsuccessfully argued the application of the federal and state tolling statutes in *Levy II*. Pet., p. 3. Though the argument on those statutes was not precisely the same as Petitioners now present, the result is the same: Petitioners cannot place themselves within the protection of either statute.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS CANNOT BRING THEMSELVES WITHIN THE PROTECTION OF THE SUPPLEMENTAL JURISDICTION STATUTE

Petitioners contend that tardy filing of their claims in state court was protected by 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute. Pet., p. 5. The fatal flaw to this claim is that, under the procedural history of this case, Petitioners cannot reach the tolling provision of subsection (d).

Before Petitioners can qualify for protection under the federal tolling provision, they must cross two critical thresholds: first, they must show that the U.S. District Court had original jurisdiction over *Levy I* and *II*. 28 U.S.C. § 1367(a). Patently, that is not the case.

Levy I was dismissed for want of diversity jurisdiction. Memorandum Opinion and Order, April 28, 1998. In determining that it had no jurisdiction, the district court specifically addressed § 1367:

> No court has held in a case similar to the present one, that § 1367 permits a federal court to exercise supplemental jurisdiction over a claim against a non-diverse party where jurisdiction is predicated on diversity, and many cases have held to the contrary.

Memo. Op. & Ord., p. 7, citations omitted. The court concluded, "The entire case must be dismissed for lack of subject matter jurisdiction under the diversity and supplemental jurisdiction statute". *Ibid.*, p. 8.[5] Petitioners did not appeal dismissal of *Levy I*. Rather, they filed *Levy II* using essentially the same Complaint the *Levy I* court had said would be futile and subject to dismissal.

Levy II was dismissed on motion by the federal defendants because Petitioners' claim was time-barred under the FTCA. *Levy II*, Memo. Op. & Ord., Dec. 30, 1998, pp. 3-9. The District Court predictably dismissed the non-governmental defendants for the same lack of diversity that prevented jurisdiction from attaching in *Levy I*. *Ibid.*, pp. 9-10. The *Levy II* court found that because,

> complete diversity does not exist, the court is without a source of jurisdiction over the remaining non-federal defendants and consequently must dismiss all counts directed against them, due to a lack of subject matter jurisdiction.

Memo. Op. & Ord., p. 10.

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5. The district court then proceeded to analyze Petitioners' proposed Amended Complaint, and found that it would be futile, since it would be immediately subject to successful motions for summary judgment or to dismiss. Memo. Op. & Ord., pp. 8-11.

Dismissal of *Levy II* was affirmed by the Tenth Circuit Court of Appeals. *Levy v. Swift Transportation Co.*, 194 F.3d 1320 (10th Cir. 1999). This Court then denied certiorari. *Levy v. Swift Transportation Co.*, 529 U.S. 1055 (2000).

Accordingly, the federal courts have never had original jurisdiction over *Levy I* or *II*. Petitioners cannot cross the first threshold necessary to bring their case within the ambit of § 1367.

The second threshold barring Petitioners' entry into the realm of the savings statutes is found in 28 U.S.C. § 1367(d), itself. Under that section, a prerequisite to extending the limitations period for supplemental jurisdiction claims is that the claim has been "voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a)." There has been no voluntary dismissal in any of these proceedings.

Dismissal of the federal court cases was hotly contested. Petitioners fought hard to maintain their action in *Levy I*. They opposed Respondents' Motion to Dismiss for Lack of Jurisdiction and sought, in a separate motion, to amend their Complaint so as to create jurisdiction. The court found it had no jurisdiction, and that amending the Complaint would not cure that defect.

When Respondents moved to dismiss *Levy II*, Petitioners opposed the Motion and again unsuccessfully sought to amend their already once-amended Complaint. Failing that effort, Petitioners sought reconsideration of the dismissal under F. R. Civ. P. 59. Upon denial of that motion, Petitioners appealed to the Tenth Circuit, and having that appeal denied, unsuccessfully sought *en banc* reconsideration. Their Petition

for Writ of Certiorari to the Tenth Circuit was denied by this Court. While this case may be said to have a number of aspects, voluntary dismissal by Petitioners is not one of them.

II.

PETITIONERS MISINTERPRET THE PLAIN MEANING OF 28 U.S.C. § 1367(d)

> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d).

Petitioners, using strained logic and grammatical interpretation, attempt to redraft § 1367(d) for their benefit. In doing so, they either ignore the plain draftsmanship of the statute or attempt to relegate an important condition, "unless", to the level of a mere coordinate conjunction. Pet., p. 8. The primary rule of statutory construction is to look for the plain meaning of what has been written. *See, Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1998) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

Petitioners' misinterpretation begins with their attempt to use the so-called "last antecedent rule". They take the first four words of the section, eliminate a substantial amount of language,[6] and then jump to the language they want interpreted. Reading the statute this way changes the meaning Congress intended.

Petitioners emphatically argue that, " . . . when a plaintiff refiles his claims within the 30-day post-dismissal period provided by § 1367(d), it is the applicability of the state statute which determines whether or not the claims are time-barred". Pet., p. 6 (emphasis removed). They then claim that it is improper to apply the state statute, because doing so allows states to control application of federal law. *See*, Pet., p. 7.

The inaccuracy of this position is patent: The existence of a state tolling period longer than 30 days is what makes state law applicable. The timing of Petitioners' filing of their subsequent Complaint within the longer period[7] is wholly irrelevant to the analysis under § 1367(d).

The plain meaning of § 1367(d) is that the federal rule tolling a statute of limitations during pendency of a case in federal court and for 30 days thereafter is applicable only when there is no state law providing a longer tolling period. This is the only reasonable reading of the phrase, "unless state law provides for a longer tolling period". § 1367(d).

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6. This includes the language which requires voluntary dismissal of claims to make the subsection applicable in the first place. *See* Argument I, *supra*, pp. 5 and 6.

7. Six months in this case. NMSA 1978, § 37-1-14.

Contrary to Petitioners' argument, states are not placed in absolute control of the federal law. Rather, Congress intended the federal statute to fill a void left by states that have not provided a tolling period for voluntarily-dismissed federal court cases. Congress created only a bare minimum tolling period. Where, as in this case, the state has a tolling period longer than 30 days, Congress has reasonably deferred to the statute that is more beneficial to the dismissed party. This kind of deference is proper and recognized. For example, Congress has deferred to state law by setting a jurisdictional threshold for diversity of jurisdiction cases, so that cases below a set value must be handled in state courts. 28 U.S.C. § 1332.

Still looking at the plain meaning of the statute, it becomes clear that if a state's tolling statute provides a longer period than § 1367(d), then the entirety of the state statute, and its interpretive law, govern the situation. Thus, rather than merely extending the time to file, the deference to state law includes application of the entire state statute and its interpretation by that state's courts. Any other reading would lead to absurd and wholly inconsistent results, such as that Petitioners are forced to advocate under their theory:

> Therefore [sic] when a plaintiff refiles his claims within 30 days after dismissal, the applicable statutes of limitation are tolled by § 1367(d), regardless of the existence or applicability of a state tolling provision.

This type of argument places the cart before the horse, and would effectively reverse Congress' intent in enacting § 1367(d) in the first place.

The New Mexico Court of Appeals correctly determined that because the state tolling statute, NMSA 1978, § 37-1-14, has a longer tolling period than the federal statute, the state statute – the entire state statute – applies. Under the state statute, Petitioners' claims are time-barred if they were negligent in prosecuting them. The Court of Appeals correctly found that Petitioners were negligent in prosecuting their case. Pet., Appendix A. The State Supreme Court denied certiorari. Pet., Appendix D. Petitioners have not challenged that finding here. The New Mexico Court of Appeals' decision is, therefore, the law of this case.

CONCLUSION

Petitioners' imaginative interpretation of 28 U.S.C. § 1367 fails because they cannot meet the prerequisites necessary to bring their case within its terms, and because the interpretation they attempt to apply is contrary to the plain meaning of the statute. The New Mexico Court of Appeals correctly affirmed dismissal of their Complaint under New Mexico law.

Respectfully submitted,

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